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Supreme Court, U.S.
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No. 02-1374

IN THE

Supreme Court of the United States

STEVEN J. ALBRECHTSEN,

Petitioner,

v.

BOARD OF REGENTS OF THE
UNIVERSITY OF WISCONSIN SYSTEM,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

REPLY BRIEF

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I. The Response Seeks to Avoid the Question Presented for Review in the Petition.

The Response to Petition for a Writ of Certiorari is a transparent attempt to divert the Court's attention from the real issue raised in the Petition. Perhaps the most salient thing about it is respondent's effort, once again, to rehash the facts in a light most favorable to the respondent – as if this case has to do with a motion for summary judgment or a motion for a directed verdict. Yet, the Petition relates to a unanimous verdict of a jury and the subsequent exercise of discretion by a United States district judge who was intimately acquainted with the case by virtue of being present throughout all the proceedings in the trial court, from start to finish.

Why respondent's appeal arguably may have had some merit is irrelevant. It will not be necessary for this Court to assess the merits and weigh the facts, if the Petition is granted. That was the job of the court of appeals, although it did not review the record or the district judge's ruling as it should have.

The Response raises issues not raised by the Petition that need not be considered by the Supreme Court. The court of appeals can deal with those issues, if necessary, on remand, and presently they truly are immaterial.

The Response repeats the cardinal error in this case of focusing exclusively upon the January 10, 1997 letter and ignoring all the other relevant evidence. It also ignores criticism of the respondent by the court of appeals and persists in presenting evidence favoring only the respondent with inferences drawn exclusively in respondent's best interests. Even its purported "Questions Presented" is grossly argumentative.

The first issue is stated as follows: "When adverse employment actions occur *fourteen months after protected conduct*, is that legally insufficient, *without more*, to prove causation on a Title VII retaliation claim?" (Emphasis added.) That formulation of the issue, consistent with the Response's so-called "Statement of Relevant Facts," ignores all of the happenings during the 14-month period between January of 1997 and March of 1998 as well as all of the contextual evidence regarding gender-based discrimination, complaints, and retaliation from 1987 through the summer of 1998.

The second issue is stated as follows:

> When a Title VII retaliation claim is based on alleged opposition to sex discrimination *in a letter* mentioning neither sex nor gender, and when the trial record discloses *no awareness by the alleged retaliators* that the letter opposed sex discrimination, is the evidence legally insufficient to support a jury verdict for the plaintiff on that claim?

(Emphasis added.) When will the respondent ever stop pretending – as it has before, during, and after trial – that this case is exclusively about that letter? Respondent's naive insistence that "the trial record discloses no awareness by the alleged retaliators that the letter opposed sex discrimination" completely discounts the trial testimony of the petitioner and his witnesses, as well as the other evidence cited by petitioner in his appellate brief that was examined in detail by Judge Wood in her dissent.

The third issue is stated as follows: "When an appellant, under Fed. R. Civ. P. 50, contests the sufficiency of evidence underlying a verdict *and the appellee presents no alternate*

statement of facts with appropriate record references, is the circuit court constitutionally barred from assuming the appellant's *statement of facts is accurate*?" (Emphasis added.) It is simply not true that petitioner presented "no alternate statement of facts" or that he failed to make "appropriate record references." He simply did so in the argument portion of his brief that followed the section entitled "Statement of Facts." Further, appellant's own statement, as even the majority of the court of appeals itself made clear, was not either a proper statement of facts or accurate.

One who reads the Response probably is left more confused than ever about the facts that are in the record. Fortunately, the dissenting opinion remains intact as a vehicle for clarification. The dissent effectively disposes of the arguments made in Sections I and II of the Response.

II. The Decision of the Court of Appeals Violates the Seventh Amendment Because it Weighs the Evidence and Makes Credibility Determinations Rather than Considering the Evidence in the Record Which Substantially Supports the Verdict of the Jury.

Respondent tries to justify the opinion of the court below by citing cases that uniformly are inapposite. Most are cases involving the granting of summary judgment under Rule 56. Others, which may have to do with Rule 50, involve only instances in which the district court either granted or denied a motion for directed verdict at the close of the plaintiff's case in chief. All of those cases under Rule 50 or Rule 56 involve the issue of whether to present the case to a jury for deliberation and a verdict. They all involve the question of whether there were genuine issues of fact to be determined by a jury. In the case at bar, the true issues are the sufficiency

of the evidence in support of the verdict and whether or not the district judge abused his discretion in denying respondent's post-trial motion for judgment as a matter of law.

Further, each of the cases cited by respondent is distinguishable from the instant action on its facts. Those cases involved instances where there really was either *no evidence* of a wrongful employment action or *no evidence* of a nexus between protected conduct and the wrongful employment action. Again, reference to the dissent in the instant action is all that is needed to distinguish those cases. The Response truly fails to show any reason why the Court should not accept this case.

III. The Unusual Departure by the Court of Appeals from the Accepted Course of Judicial Proceedings Calls for an Exercise of the Court's Supervisory Power.

At least since the decision in *Neely v. Martin K. Eby Constr. Co.*, 386 U.S. 317 (1967), it has been clear that "appellate rulings on post-trial pleas for judgment as a matter of law call for the exercise of 'informed discretion,' . . . and fairness to the parties is surely key to the exercise of that discretion." *Weisgram v. Marley Co.*, 528 U.S. 440, 454 (2000), *quoting Neely*, 386 U.S. at 329. In the context of a case such as the one at bar, discretion, including deference to the trial judge and to the verdict, melds with basic fairness. The Seventh Amendment is implicated, *see, e.g., Weisgram*, 528 U.S. at 454 n.10, and it is apparent that failure to give such deference is contrary to the mandate of the Seventh Amendment.

A lack of fairness is prominent in the decision of the court of appeals – pointing conspicuously to a failure by the court below to exercise "informed discretion." The respondent contends that "[g]ranting certiorari . . . would needlessly dilute this Court's resources." Response at 16. Some may argue that today the Court has a case load too big and too pressing to allow for the granting a writ of certiorari in a case like this. However, if proper exercise of the Court's supervisory power still "may be a compelling reason to grant a petition for a writ of certiorari," as is stated in Sup. Ct. R. 10(a), petitioner humbly and respectfully submits that this case is a good example of one which falls within the rule.

Conclusion

For the foregoing reasons, and those set forth in the Petition for a Writ of Certiorari, petitioner Steven J. Albrechtsen requests that the Court grant the Petition.

Respectfully submitted,

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